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# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1953

## No. 163

RAILWAY EXPRESS AGENCY, INCORPORATED,
APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

FILED JULY 4, 1953

Probable jurisdiction noted October 12, 1953

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[fol. 1]

## IN THE SUPREME COURT OF APPEALS OF VIRGINIA AT RICHMOND

Record No. 4036

VIRGINIA:

In the Clerk's Office of the Supreme Court of Appeals at Richmond on the 13th day of August, 1952.

RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant,

against

COMMONWEALTH OF VIRGINIA, Appellee

From the State Corporation Commission

APPEAL AS OF RIGHT AWARDED—August 13, 1952

This is to certify that upon the petition of Railway Express Agency, Incorporated, (No. 10,629), an appeal as of right has been awarded by one of the Justices of the Supreme Court of Appeals on the 12th day of August, 1952, from an order entered by the State Corporation Commission on the 16th day of June, 1952, *in re* application of Railway Express Agency, Incorporated, no bond being required.

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[fol. 2] IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 4037

[Title omitted]

APPEAL OF RIGHT AWARDED—August 13, 1952

This is to certify that upon the petition of Railway Express Agency, Incorporated, (No. 10,767), an appeal as of right has been awarded by one of the Justices of the Supreme Court of Appeals on the 12th day of August, 1952, from an order entered by the State Corporation Commission on the 16th day of June, 1952, *in re* application of Railway Express Agency, Incorporated, no bond being required.

[fol. 3] BEFORE THE STATE CORPORATION COMMISSION

PETITION OF RAILWAY EXPRESS AGENCY, INCORPORATED, (FOR CORRECTION OF ASSESSMENT OF A LICENSE TAX FOR THE YEAR 1950, AND FOR A REFUND OF SUCH LICENSE TAX)

(Case No. 10629)

To the Honorable, the State Corporation Commission of Virginia:

Railway Express Agency, Incorporated, a corporation organized and existing under the laws of the State of Delaware and having its principal place of business at 230 Park Avenue, New York, New York, respectfully presents this Petition pursuant to the provisions of Section 58-1122 of the Code of Virginia, 1950, and represents to your Honorable Body as follows:

1. That it is engaged in the handling and transportation of goods, wares and merchandise in express service by means of railway cars, motor trucks and airplanes in each of the States of the United States, including the State of Virginia, in which it sought but was denied authority by this Honorable Body on April 8, 1929, to transact such business in *intrastate commerce* in this State.

2. That pursuant to the opinion of the Supreme Court of Appeals of Virginia (153 Va. 498) affirming the foregoing decision of your Honorable Body, your Petitioner caused Railway Express Agency, Incorporated, of Virginia, to be organized under the laws of this State on October 20, 1931, for the purpose of conducting express service in intrastate commerce in this State, and that corporation, as a wholly owned subsidiary of your petitioner, has since 1932 conducted the intrastate express business in Virginia theretofore conducted by your Petitioner.

3. That Railway Express Agency, Incorporated, of Virginia has since 1933 reported to your Honorable Body, been [fol. 4] assessed with and has paid annually all taxes on property and money used and employed by it in intrastate commerce in this State, including a license tax (for the privilege of doing business in this State) based on its gross receipts from operations in this State, as required by Sec-

tion 58-547 and its antecedent sections of the Tax Code of Virginia. That the said Virginia Company paid a license tax in the year 1950 in the amount of $16,109.92, based upon its gross receipts from operations in this State in the year 1949 in the amount of $749,298.77.

4. That your Petitioner has since 1930 reported to your Honorable Body and been assessed with and has paid annually all taxes on property and money used and employed by it in interstate commerce in this State, and has likewise reported, under protest, been assessed with in the manner hereinafter stated, and has paid annually, under protest, a license tax (for the privilege of doing business in this State) allegedly based on its gross receipts from business beginning and ending within this State and on all receipts earned in this State on business passing through, into and out of this State, as required by Section 58-547 and its antecedent sections of the Tax Code of Virginia.

5. That the legality, manner of determining and amount of the license tax assessable annually against your Petitioner, under authority of Section 58-547 and its antecedent sections of the Code of Virginia, have been the subject of frequent hearings, formal and informal, before your Honorable Body, with the result that various methods and formulae for determining the gross receipts of your Petitioner subject to assessment in this State, and the amount of license taxes annually to be imposed thereon, have not been uniform or strictly within the requirements of the aforesaid section of the Tax Code of Virginia, and, while accepting the various assessments annually made against it in this respect by your Honorable Body and while paying the license taxes annually imposed against it in pursuance of such assessments, allegedly under authority of the aforesaid Section 58-547 and its antecedent sections of the Code of Virginia, your Petitioner has consistently denied liability therefore, and has paid all such taxes so imposed upon it under protest. In general, the form of protest accompanying each annual report by Petitioner to your Honorable Body of its gross receipts "on business passing through, into or out of this State" has been as follows:

"This company does an interstate business through, into and out of Virginia but it has no way of ascertaining how much of the receipts on that business is earned in Virginia.

[fol. 5] "The business passing through, into, or out of this State is interstate business and is not subject to taxation by the State. It is understood that this report is intended to be used as the basis for levying a tax under Section 219 of the Tax Code of Virginia, which prescribes a license tax for the privilege of doing business in Virginia, and which is imposed upon gross receipts. The $—— reported as 'All Receipts earned in Virginia on business passing through, into or out of this State' is computed in accordance with an understanding had with the State Corporation Commission of Virginia, and is made without prejudice to the protest of this Company against any tax being levied upon, or measured by such receipts. Protestant cannot, lawfully, be required to pay a license tax for the privilege of doing an interstate business in Virginia, as such tax cannot, legally, be imposed upon gross receipts derived exclusively from interstate commerce, and the tax if applied to the interstate receipts of protestant, would violate the commerce clause of the Constitution of the United States, and therefore is beyond the legal authority of the State of Virginia to levy."

and upon all remittances made by Petitioner of amounts paid by it on account of license taxes so imposed against it, it has designated the same as "Paid Under Protest" and receipts issued to it by the Treasurer of the State of Virginia have uniformly recited and recognized that such license fees were "Paid Under Protest".

That gross receipts in the amount of $3,286,775.70 were determined by your Honorable Body to have been derived by Petitioner in the year 1949 from the conduct of its express business in interstate commerce on 3,652.87 miles of railroad and steamship companies of which your Petitioner operated in this State, upon which a tax, at the rate of $899.78 in the aggregate amount of $70,665.68, was imposed in the year 1950.

6. That the business of your Petitioner in the carrying of goods, wares and merchandise in express service over lines of railroad and steamship companies operating in this State is wholly interstate in character, gross receipts derived therefrom are not subject to taxation under and by virtue of the laws of the State of Virginia, and the license tax

annually sought to be imposed therein by Section 58-547 and its antecedent sections of the Code of Virginia is therefore unconstitutional, null and void in that it is sought to be imposed upon the right and privilege of your petitioner to [fol. 6] do an interstate express business in this State, and constitutes a direct burden upon such commerce and a tax upon your Petitioner for the privilege of engaging therein, in contravention of the provisions of Article I, Section 8, paragraph 3, of the Constitution of the United States, conferring upon the Congress thereof the sole and exclusive power to regulate commerce among the several States.

Wherefore, your Petitioner respectfully prays that the assessment against it by your Honorable Body of a license tax for the year 1950, in the amount of $70,665.68, may be reviewed and corrected, and held to be invalid, null and void, that the said 1950 assessment may be expunged and removed from the public records, and that the Comptroller be directed and required to draw a warrant in favor of your Petitioner on the Treasurer of the State of Virginia, pursuant to the provisions of Section 58-1124 of the Code of Virginia, in the amount of $70,665.68, with interest thereon from the date of payment, in refund of the tax so paid by Petitioner.

And your Petitioner will ever pray, etc.

Railway Express Agency, Incorporated, by W. A. Benson, Vice President.

Thomas B. Gay, Attorney.

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*Duly sworn to by W. A. Benson. Jurat omitted in printing.*

[fol. 7] BEFORE THE STATE CORPORATION COMMISSION

PETITION OF RAILWAY EXPRESS AGENCY, INCORPORATED, (FOR CORRECTION OF ASSESSMENT OF A LICENSE TAX FOR THE YEAR 1951, AND FOR A REFUND OF SUCH LICENSE TAX)

Case No. 10767

To the Honorable, the State Corporation Commission of Virginia:

Railway Express Agency, Incorporated, a corporation organized and existing under the laws of the State of Delaware and having its principal place of business at 230 Park Avenue, New York, New York, respectfully presents this Petition pursuant to the provisions of the statutes of the State of Virginia in such cases made and provided, and represents to your Honorable Body as follows:

1. That it is engaged in the handling and transportation of goods, wares and merchandise in express service by means of railway cars, motor trucks, and airplanes in each of the States of the United States, including the State of Virginia, in which it is sought but was denied authority by this Honorable Body on April 8, 1929, to transact such business in *intrastate commerce* in this State.

2. That pursuant to the opinion of the Supreme Court of Appeals of Virginia (153 Va. 498) affirming the foregoing decision of your Honorable Body, your Petitioner caused Railway Express Agency, Incorporated, of Virginia to be organized under the laws of this State on October 20, 1931, for the purpose of conducting express service in intrastate commerce in this State, and that corporation, as a wholly owned subsidiary of your Petitioner, has since 1932 conducted the intrastate express business in Virginia theretofore conducted by your Petitioner.

[fol. 8] 3. That Railway Express Agency, Incorporated, of Virginia has since 1933 reported to your Honorable Body, been assessed with and has paid annually all taxes on property and money used and employed by it in intrastate commerce in this State, including a license tax (for the privilege of doing business in this State) based on its gross receipts from operations in this State, as required by Sec-

tion 58-547 and its antecedent sections of the Tax Code of Virginia. That the said Virginia Company paid a license tax in the year 1951 in the amount of $13,377.56, based upon its gross receipts from operations in this State in the year 1950 in the amount of $622,211.90.

4. That your Petitioner has since 1930 reported to your Honorable Body and been assessed with and has paid annually all taxes on property and money used and employed by it in interstate commerce in this State, and has likewise reported, under protest, been assessed with, in the manner hereinafter stated, and has paid annually, under protest, a license tax (for the privilege of doing business in this State) allegedly based on its gross receipts from business beginning and ending within this State and on all receipts earned in this State on business passing through, into and out of this State, as required by Section 58-547 and its antecedent sections of the Tax Code of Virginia.

5. That the legality, manner of determining and amount of license tax assessable annually against your Petitioner, under authority of Section 58-547 and its antecedent sections of its Code of Virginia, have been the subject of frequent hearings, formal and informal, before your Honorable Body, with the result that various methods and formulae for determining the gross receipts of your Petitioner subject to assessment in this State, and the amount of license taxes annually to be imposed thereon, have not been uniform or strictly within the requirements of the aforesaid section of the Tax Code of Virginia, and, while accepting the various assessments annually made against it in this respect by your Honorable Body and while paying the license taxes annually imposed against it in pursuance of such assessments, allegedly under authority of the aforesaid Section 58-547 and its antecedent sections of the Code of Virginia, your Petitioner has consistently denied liability therefor, and has paid all such taxes so imposed upon it under protest. In general, the form of protest accompanying each annual report by Petitioner to your Honorable Body of its gross receipts "on business passing through, into or out of this State" has been as follows:

[fol. 9] "This company does an interstate business through, into and out of Virginia but it has no way of ascer-

taining how much of the receipts on that business is earned in Virginia.

"The business passing through, into, or out of this State is interstate business and is not subject to taxation by the State. It is understood that this report is intended to be used as the basis for levying a tax under Section 219 of the Tax Code of Virginia, which prescribes a license tax for the privilege of doing business in Virginia, and which is imposed upon gross receipts. The $..... reported as 'All Receipts earned in Virginia on business passing through, into or out of this state', is computed in accordance with an understanding had with the State Corporation Commission of Virginia, and is made without prejudice to the protest of this Company against any tax being levied upon, or measured by such receipts. Protestant cannot, lawfully, be required to pay a license tax for the privilege of doing an interstate business in Virginia, as such tax cannot, legally, be imposed upon gross receipts derived exclusively from interstate commerce, and the tax if applied to interstate receipts of protestants, would violate the commerce clause of the Constitution of the United States, and therefore is beyond the legal authority of the State of Virginia to levy."

and upon all remittances made by Petitioner of amounts paid by it on account of license taxes so imposed against it, it has designated the same as "Paid Under Protest" and receipts issued to it by the Treasurer of the State of Virginia have uniformly recited and recognized that such license fees were "Paid Under Protest".

That gross receipts in the amount of $3,090,916.55 were determined by your Honorable Body to have been derived by Petitioner in the year 1950 from the conduct of its express business in interstate commerce in the State of Virginia, upon which a State license tax at the rate of $2.15 per $100.00, in the aggregate amount of $66,454.71, was assessed and imposed in the year 1951.

6. That the assessment of the aforesaid license tax in the amount of $66,454.71 on the gross receipts derived by your Petitioner in the year 1950 from the conduct of its express business in interstate commerce was not made in accordance with the terms and provisions of Section 58-547 of the Code

of Virginia, 1950 (which provide for an apportionment of total receipts by applying a fraction the numerator of which is the entire mileage over which such business is done and the denominator of which is Virginia mileage, which should, if otherwise valid, have applied a fraction, the numerator of [fol. 10] which is Virginia mileage and the denominator of which is the entire mileage over which such business is done) and is therefore null and void.

7. That the business of your Petitioner in the carrying of goods, wares and merchandise in express service over the lines of railroad and steamship companies operating in this State is wholly interstate in character, gross receipts derived therefrom are not subject to taxation under and by virtue of the laws of the State of Virginia, and the license tax annually sought to be imposed thereon by Section 58-547 and its antecedent sections of the Code of Virginia is therefore unconstitutional, null and void in that it is sought to be imposed upon the right and privilege of your Petitioner to do an interstate express business in this State, and constitutes a direct burden upon such commerce and a tax upon your Petitioner for the privilege of engaging therein, in contravention of the provisions of Article I, Section 8, paragraph 3, of the Constitution of the United States, conferring upon the Congress thereof the sole and exclusive power to regulate commerce among the several States.

Wherefore, your Petitioner respectfully prays that the assessment against it by your Honorable Body of a License tax for the year 1951, in the amount of $66,454.71, may be reviewed and corrected, and held to be invalid, null and void, and that the said 1951 assessment may be expunged and removed from the public records, and that the Comptroller be directed and required to draw a warrant in favor of your Petitioner on the Treasurer of the State of Virginia, pursuant to the statutes of the State of Virginia in such cases made and provided, in the amount of $66,454.71, with interest thereon from the date of payment, in refund of the tax so paid by petitioner.

And your Petitioner will ever pray, etc.

Railway Express Agency, Incorporated, by W. A. Benson, Vice President.

Thomas B. Gay, Attorney.

*Duly sworn to by W. A. Benson. Jurat omitted in printing.*

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[fol. 11] BEFORE THE STATE CORPORATION COMMISSION

[Title omitted]

Case No. 10629

ORDER SETTING CAUSE FOR ARGUMENT—July 19, 1951

On July 16, 1951, came the Railway Express Agency, Incorporated, by Thomas B. Gay, its attorney, and presented a petition under Section 58-1122 of the Code for the correction of assessment and refund of taxes on gross receipts in the amount of $70,665.68 collected from the said Railway Express Agency, Incorporated and representing a tax on its gross receipts for the year 1949 and imposed in the year 1950. Accordingly, it is

Ordered:

(1) That a proceeding under Section 58-1123 of the Code be instituted, assigned Case No. 10629, docketed and set for hearing at 10:00 o'clock, a. m., on July 30, 1951, in the courtroom of the Commission in the State Office Building in the City of Richmond, Virginia.

[fol. 12] (2) That an attested copy of this order be sent to the Attorney General of Virginia and that attested copies of this order be sent to the attorney for the petitioner and to the Director of the Division of Public Utility Taxes.

N. W. Atkinson, Clerk of the State Corporation Commission.

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BEFORE THE STATE CORPORATION COMMISSION

[Title omitted]

Case No. 10767

ORDER SETTING CAUSE FOR ARGUMENT—November 8, 1951

On November 7, 1951, came the Railway Express Agency, Incorporated, by Thomas B. Gay, its attorney, and presented

a petition for the correction of assessment and refund of taxes in the amount of $66,454.71, collected from the said Railway Express Agency, Incorporated, and representing a tax on its gross receipts for the year 1950 and imposed in the year 1951. Accordingly, it is

Ordered:

(1) That a proceeding be instituted, assigned Case No. 10767, docketed and set for hearing at 10:00 o'clock a. m., on January 22, 1952, in the courtroom of the State Corporation Commission in the State Office Building in the City of Richmond, Virginia.

(2) That an attested copy of this order be sent to the Attorney General of Virginia and that attested copies of this order be sent to the attorney for the petitioner and to the Director of the Division of Public Utility Taxes.

N. W. Atkinson, Clerk of the State Corporation Commission.

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[fol. 13] BEFORE THE STATE CORPORATION COMMISSION

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

[Title omitted]

Cases Nos. 10,629 and 10,767

Present: Commissioners H. Lester Hooker (Chairman), W. Marshall King, Ralph T. Catterall (Presiding).

APPEARANCES:

Thomas B. Gay, H. M. Pasco, W. H. Waldrop, Jr., Counsel for Applicant; Henry T. Wickham, Assistant Attorney General, Counsel for the Commonwealth; Norman S. Elliott, Counsel for the Commission.

PAUL GROSS, JR., a witness introduced on behalf of Petitioner, being first duly sworn, testified as follows:

"By Mr. Gay:

Q. Will you please state your name and occupation?

A. My name is Paul Gross, Jr., and my position is that of Assistant to Vice President, Accounting of the Railway Express Agency, Incorporated, of Virginia, and Railway Express Agency, Incorporated, the Delaware corporation."

* * * * * * *

"Q. Did Exhibit 3 in Case 10629 and Exhibit 3 in Case 10767 contain a form of protest in respect to the Company's non-liability for license taxation in Virginia on account of the fact that its gross earnings from interstate commerce were not taxable in this State?

"A. They do contain such protest."

* * * * * * *

"Q. Mr. Gross, have you, at my request, prepared a statement showing the gross receipts reported and the State license tax paid as assessed by the Commission for the years 1931 through 1951 by the Delaware Company?

"A. I have.

[fol. 14] "Q. Does that statement also contain a showing of money on deposit and taxes paid on that?

"A. It does.

"Q. And does it also show the reported value of real and tangible property of the corporation?

"A. Yes.

"Q. And the amount of assessment of the property valued by the Commission?

"A. It does.

"Q. And the tax paid to the localities?

"A. Yes.

"Q. All for the years 1931 through 1951, inclusive?

"A. Yes."

Mr. Gay: We offer that as the next exhibit in both cases.

Commissioner Catterall: It will be received as Exhibit 6 and will be filed in Case 10767, it being understood that only one record will be written up for both cases.

* * * * * * *

"Q. Have you also prepared, at my request, a statement showing the same information with respect to the Virginia Company for the same period of time?

"A. With the exception that this statement shows the payment of assessments for the years 1933 to 1951, inclusive."

Commissioner Catterall: That will be Exhibit 7 in Case 10767.

Mr. Gay:

Q. Coming back to the statement, Exhibit 6, Mr. Gross, I notice beginning with the year 1940 and running through the year 1942, that there are two figures shown for each year, which are explained by notation at the bottom bearing similar symbols, the first in each year being amount of gross receipts reported and the other amount of gross receipts assessed by the Commission; is that correct?

A. That is correct.

Mr. Gay: I would like to offer, if your Honors please, at this point, a copy of a letter from Mr. H. S. Marx, then General Counsel of the Railway Express Agency, Incorporated, of December 10th, 1942, to Mr. J. C. Masten, First Assistant [fol. 15] Assessor, with the attached memorandum, the original of which I take to be in Mr. Masten's files.

* * * * * * *

"Commissioner Catterall: Then it will be admitted in evidence as Exhibit 8."

* * * * * * *

"Mr Gay:

Q. Are you familiar with the memorandum attached to Mr. Marx's letter to Mr. Masten, attached to the letter just filed?

A. I am.

Q. Subsequent to the date of that letter, has the Company reported gross receipts to the Commission in conformity with the understanding expressed therein, and has it reported such gross receipts in accordance with that understanding, however, under protest?

A. Yes.

Q. I call attention to the language of Section 58-547 of the Tax Code of Virginia, to the effect that where an express company is 'operating partly within and partly without

this State' the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State', and ask you whether the amounts of gross receipts as reported by the Company have any relationship to the statutory formula?

A. They do not.

Q. Do you know what sort of formula was employed for the purpose of determining the amount of interstate gross receipts of the Delaware Company prior to 1942?

A. The gross receipts were determined by applying to the mileage operated in the State an arbitrary or fixed amount to represent the gross receipts per mile.

Q. You mean the mileage operated in Virginia with respect to the System mileage?

A. No, the miles operated in the State of Virginia by the Express Company, to which was applied an arbitrary or fixed amount of revenue in the sum of say $300 or $350 per mile.

Commissioner Catterall:

Q. Mr. Gay did not read you the part of the statute that [fol. 16] was in the formula, and when you said the formula was not followed, did you mean the formula was not followed or what Mr. Gay read you was not followed?

A. What we did follow was the understanding reached and referred to in the letter submitted as Exhibit No. 8. That is the formula we followed. I understood Mr. Gay's question to be whether that formula represented or effectively showed or reflected the gross receipts in Virginia contemplated under the particular section of the statute from which he has read.

Mr. Gay:

Q. As I understand you, then, the gross receipts upon which the Company was taxed in the years prior to 1942 were determined by the use of some such figure as $300 or $325 per mile of miles operated in Virginia?

A. That is correct.

Q. Turn, sir, a moment to Exhibit 7 and state what the gross receipts reported in Column D of that statement reflect?

A. The figure reported in column D of Exhibit 7 reflect the gross receipts reported by the Virginia Company and represent the gross intrastate receipts earned by the Virginia Company during the years indicated on Exhibit 7.

Q. Those are the actual gross receipts?

A. Yes.

Q. From intrastate commerce?

A. That is correct.

* * * * * * *

Cross-examination.

By Mr. Wickham:

"Q. You have testified to the fact that the Delaware Company has always filed under protest, or paid under protest rather, their so-called 'license taxes' based on gross receipts. Do you know whether or not the Delaware Company has, previous to these cases, filed any petitions for refunds for such taxes?

"A. I do not know of it.

"Q. Do you have any knowledge of any such petitions having been filed?

"A. No, I do not.

"Q. In your position as Assistant to the Vice President, if any petitions were filed, would you not be aware of them? [fol. 17] "A. If petitions were filed and the Accounting Department had been directly interested in the proceeding, we would be notified of it, yes.

"Q. You were aware that the petitions filed in this case were contemplated?

"A. As a matter of fact, I was not."

Commissioner Catterall:

Q. If any petitions in the past had been granted, would they have come to your attention?

A. They would.

Q. Has any information upon that come to your attention?

A. They did not come to my personal attention.

Mr. Wickham:

Q. Referring to the exhibit, the letter of the Delaware Company, and also the formula prescribed and set up in order to arrive at the proper tax on gross receipts, the Delaware Company agreed to this formula, did they not?

A. I would not term the memorandum 'an agreement.' I think it is an understanding reached between Mr. Marx, the writer of the letter, and Mr. Masten, outlining what the Delaware Company would report as to gross receipts for the year in question.

Q. The Delaware Company made no objection or protest to this formula on this point?

A. Except that the reports were filed in protest.

Q. But there was no objection to this formula as to the actual taxes to be paid?

A. I do not know of any except that they were filed with the protest attached and the drafts issued with protest attached, and the receipts were acknowledged 'paid' as having been received under protest."

* * * * * * *

"Q. Does the Delaware Company have any agreement with the railroads as to operating lines?

"A. The Railway Express Company, the Delaware Company, conducts the express transportation business over the lines of all railroads in the Country and the principal lines under the so-called 'Standard Agreement' or the 'Express Operations Agreement', which became effective in March, 1939.

[fol. 18] "Q. That 'Standard Agreement' is between the railroads and the Delaware Company?

"A. Yes."

* * * * * * *

Cross-examination.

By Mr. Elliott:

Q. The Delaware Company is owned by the railroads, as I understand it?

A. It is, the principal railroads. There are 68 stockholders.

Q. And any money which the Delaware Company earns over and above its expenses is paid to the railroads in the form of compensation for performing their part of the service?

A. That is correct. In the Accounting Classification, the account to which we charge off payments is designated 'Express Privileges' and has been in the accounts of the Interstate Commerce Commission many years.

Q. What securities does the Delaware Company have outstanding, or did it have in 1951?

A. In 1951, it had the one thousand shares of stock issued to the stockholders of the Railway Express Company. That is all.

Q. Does it have any other forms of debts or securities?

A. It does not.

Q. How does it raise its capital to do business?

A. The capital to do business was raised in 1929, or thereabouts, through the issuance of bonds in the sum of $32,000,000.

Q. Those bonds have be-n retired and there are no securities outstanding other than the capital stock you referred to; is that not correct?

A. That is correct.

• • • • • • •

Redirect examination.

"By Mr. Gay:

Q. You referred to the fact that the Delaware Company had a thousand shares of stock issued and outstanding and that it was issued to the railroads that own the property. [fol. 19] Was that stock issue had and the $32,000,000 of bonds issued listed issued in Finance Docket No. 7322?

A. They were approved by the Commission in that docket.

Q. Without going into the details, does the opinion in that case, Mr. Gross, recite historically the ownership and operation of the Express Company in America?

A. Very completely.

Mr. Gay: We don't want to file the opinion but we rely on the findings of the Commission in Finance Docket 7322,

reported in 150 I. C. C. at page 423, decision rendered February 11, 1929.

Commissioner Catterall: You will give us all of those references.

Mr. Gay: Yes, we will.

Mr. Gay:

Q. You stated those bonds had all been paid off, that is the $32,000,000, under the Interstate Commerce Commission order?

A. That is correct.

Q. Who paid them off?

A. The bonds were liquidated by contributions of cash made by the railroad companies to retire the bonds as and when they came due.

Q. So they were not paid out of the earnings of the Delaware Company?

A. Oh, no.

Q. How is this advance made by the railroads, to go a little further into that, although it may not be material, carried on the books of the Delaware Company, that is the advance made to pay off the bonds?

A. As indicated by the Balance Sheet of the Delaware Company, included in the annual information returns filed with the Interstate Commerce Commission and filed also with this Commission as of December 31st, 1950, the amount of the advances made by the stockholders to liquidate the bonds appear in Account 530, designated as 'Funded Debt Unsecured', in the sum of $28,608,570.

Q. The substance of that matter is that, instead of the public holding this $32,000,000 issue, as authorized by the Interstate Commerce Commission, at the date or when this was prescribed, that was paid off to the public and is now owed to the railroads?

A. That is correct."

[fol. 20] BEFORE THE STATE CORPORATION COMMISSION

STIPULATION OF COUNSEL AS TO RECORD ON APPEAL

It is stipulated by counsel for all parties:

1. Cases Nos. 10,629 and 10,767 having been heard together, only one record on appeal shall be made up and certified for both cases.

2. In Case No. 10,629 the tax was asses-ed pursuant to Section 58-547 of the Code in the amount of $70,665.68, the certified copy of the assessment therefor was received by the Petitioner on August 17, 1950, and the tax in the amount assessed was paid by the Petitioner to the Treasurer of Virginia on September 15, 1950, under the following protest:

"Railway Express Agency, Incorporated (a Delaware Corporation)

"This company does an interstate business through, into, and out of Virginia but it has no way of ascertaining how much of the receipts on that business is earned in Virginia.

"The business passing through, into, or out of this State is interstate business and is not subject to taxation by the State. It is understood that this report is intended to be used as the basis for levying a tax under Section 58-547 of the Code of Virginia, which prescribes a license tax for the privilege of doing business in Virginia, and which is imposed upon gross receipts. The $3,286,775.70 reported as 'All Receipts earned in Virginia on business passing through, into or out of this State,' is computed in accordance with an understanding had with the State Corporation Commission of Virginia, and is made without prejudice to the protest of this Company against any tax being levied upon, or measured by such receipts. Protestants cannot, lawfully, be required to pay a license tax for the privilege of doing an interstate business in Virginia, as such tax cannot, legally, be imposed upon gross receipts derived exclusively from interstate commerce, and the tax applied to the interstate receipts of protestant, would violate the commerce clause of the Constitution of the United States, and therefore is beyond the legal authority of the State of Virginia to levy."

3. In Case No. 10,767 the tax was assessed pursuant to Section 58-547 of the Code in the amount of $66,454.71, the certified copy of the assessment therefor was received by the Petitioner on August 18, 1951, and the tax in the amount [fol. 21] assessed was paid by the Petitioner to the Treasurer of Virginia on September 25, 1951, under the same protest under which the tax assessed for 1950 was paid.

4. Since the Commonwealth admits and the Commission has found that the taxpayer does no intrastate business in Virginia, the testimony and exhibits relating to that issue are not material on this appeal.

5. The record on appeal shall consist only of the petitions in both cases, the foregoing testimony of Paul Gross, Jr., Exhibits 6, 7, 8 in Case No. 10,767, the orders entered by the Commission, the opinion of the Commission, and this stipulation.

H. Merrill Pasco, Counsel for Applicant; Henry T. Wickham, Assistant Attorney General of Virginia; Norman S. Elliott, Counsel for the Commission.

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BEFORE THE STATE CORPORATION COMMISSION

Case No. 10629

[Title omitted]

ORDER DISMISSING APPLICATION—June 16, 1952

On March 19, 1952, came again the applicant, Railway Express Agency, Incorporated, by Thomas B. Gay, H. Merrill Pasco and W. H. Waldrop, Jr., its attorneys, and came also the Commonwealth, by Henry T. Wickham, Assistant Attorney General, and the State Corporation Commission, by Norman S. Elliott, its Counsel; and the Commission having heard all of the evidence, continued this case to permit counsel for the applicant and the Commonwealth to submit briefs.

Now on this day, briefs having been filed by the parties, and the Commission, having considered the evidence and briefs submitted by counsel, is of the opinion and finds,

[fol. 22] for reasons stated in an opinion filed this day in this case and Case No. 10767, by Catterall, Commissioner, and concurred in by Hooker, Chairman, and King, Commissioner, that the petition herein was filed too late under Section 58-672 of the Code of Virginia of 1950, and the Commission has no jurisdiction to grant the relief requested.

It is, therefore, ordered:

(1) That the application of Railway Express Agency, Incorporated, for correction of assessment and refund of taxes for the year 1950, as set forth in its application, filed herein, be dismissed, because the Commission is without jurisdiction to pass upon said application and grant the relief requested, and that this proceeding be dropped from the docket; and

(2) That attested copies hereof, together with copies of the Commission's opinion referred to herein, be sent to counsel for the applicant, and to the Attorney General of the Commonwealth.

A True Copy. Teste:
N. W. Atkinson, Clerk of the State Corporation Commission.

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BEFORE THE STATE CORPORATION COMMISSION

Case No. 10767

[Title omitted]

ORDER DISMISSING APPLICATION—June 16, 1952

On March 19, 1952, came again the applicant, Railway Express Agency, Incorporated, by Thomas B. Gay, H. Merrill Pasco and W. H. Waldrop, Jr., its attorneys, and came also the Commonwealth, by Henry T. Wickham, Assistant Attorney General, and the State Corporation Commission, by Norman S. Elliott, its Counsel; and the Commission having heard all of the evidence, continued this case to permit counsel for the applicant and the Commonwealth to submit briefs.

[fol. 23] Now on this day, briefs having been filed by the parties, and the Commission, having considered the evidence

and the briefs submitted by counsel, is of the opinion and finds, for reasons stated in an opinion this day filed in this case and in Case No. 10629, by Catterall, Commissioner, and concurred in by Hooker, Chairman, and King, Commissioner, that the relief requested in the application filed herein should be denied.

It is, therefore, ordered:

(1) That the application of Railway Express Agency, Incorporated, for correction of assessment and refund of taxes for the year 1951, be denied, and this proceeding be dropped from the docket; and

(2) That attested copies hereof, together with copies of the opinion referred to herein, be sent to counsel for the applicant and to the Attorney General of the Commonwealth.

A True Copy. Teste:

N. W. Atkinson, Clerk of the State Corporation Commission.

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Before the State Corporation Commission

OPINION—CATTERALL, COMMISSIONER

Railway Express Agency, Incorporated is a Delaware corporation, and Railway Express Agency, Incorporated, of Virginia, is a Virginia corporation. The Delaware corporation owns the stock of the Virginia corporation and since March 12, 1932, the Virginia corporation has carried on the intrastate express business in Virginia.

Since the creation of the Virginia company, both companies have paid the annual license tax imposed by § 58-547 of the Code, but the Delaware company has taken the position that the tax on it violates the commerce clause of the federal constitution. In 1930 (before the creation of the Virginia company) it raised this question in a petition to the State Corporation Commission. The Commission held the tax constitutional but reduced the amount of the tax measured by gross receipts from interstate business by about $41,000. Annual Report 1933, p. 9. The company did not appeal from that order, but for many years it has paid its taxes under protest, and, when the Supreme Court of

the United States on March 26, 1951, rendered its decision [fol. 24] in *Spector Motor Service* v. *O'Connor,* 340 U. S. 602, the company was encouraged to try again to upset the tax.

By that time, more than three months had elapsed since it had received the certified copy of the assessment for 1950, and it was too late to apply for a refund under § 58-672. It applied under § 58-1122. The petition in the second case (for 1951) was filed within the three month's period.

In Case No. 10,629 we have to decide whether we have jurisdiction to entertain the petition, or whether the petition was filed too late. On the constitutional question, the issues in both cases are, of couse, the same; and both cases were heard together.

The Question of Jurisdiction in Case No. 10,629

We have come to the conclusion that the petition in Case No. 10,629 was filed too late and that the Commission has no jurisdiction to pass on it.

Title 58 of the Code covers the subject of taxation and Chapter 12 of that title deals with the taxation of public service corporations, although the chapter includes some taxpayers that are not corporations and some corporations that are not public service companies.

Article 4 of that Chapter imposes the taxes on express companies and Article 16 covers the subject of erroneous assessments. All references in this opinion to "articles" will refer to articles in Chapter 12 of Title 58.

Article 16, in § 58-672, provides for relief from erroneous assessments on "any transportation company, transmission company or other public service corporation."

As used in the constitution and laws of Virginia, "transportation company" is a word of art that does not have its ordinary dictionary meaning. For example, a common carrier by motor vehicle is not a transportation company. An express company is a transportation company.

Sec. 153 of the constitution says:

"* * * the term 'transportation company' shall include any * * * express company * * *"

Therefore, the petitioner is included in Article 16 as specifically as if Article 16 used the words "express company;"

and Article 16 is a specific law under which express companies may apply for relief from erroneous assessments made by the State Corporation Commission.

Section 58-1122, on which petitioner relies, is a general statute for the correction of taxes assessed by the State Cor- [fol. 25] poration Commission, and it allows a petition to be filed at any time within one year *after* the tax complained of has been *paid.* The words to be construed are:

"* * * unless and except as otherwise specifically provided * * *."

Section 58-1122 provides a catchall for cases not otherwise specifically provided for. It gives rights of review to individuals as well as corporations and to corporations that are not public service corporations. Our interpretation of the legislative intent is that a petition that can be filed under Article 16 cannot be filed under § 58-1122. So far as we know, the question now raised by petitioner has never been raised before. In the past, all petitions that could be filed under Article 16 were filed under that article.

The petition filed by petitioner in Case No. 4037, reported in our 1933 Annual Report at page 9, was filed under Section 235 of the Tax Code (Acts of 1928, p. 164), which is the source of Article 16. Proceeding under that section, petitioner got a refund of over $40,000, and yet the burden of petitioner's argument seems to be that that section does not relate to refund claims. At page 11 of its brief, petitioner says:

"But there are not any other specific statutory provisions *relating to the refund of license taxes paid by express companies.*"

At page 12 of its brief, petitioner says:

"Section 58-672 * * * does not specifically provide for *a claim for refund* of taxes *already paid.*"

Section 58-672 does not use the word "refund." It uses the words "review and correction." The only way to correct an assessment that has been paid is to refund the money, and Article 16, in § 58-675 expressly provides for the refund of taxes already paid. It says:

"* * * appropriate relief shall be granted, including the right to recover from the State or local authorities, or both, as the case may be, any excess of taxes that may have been paid. The order of the Commission shall be enforced by mandamus, or other proper process, issuing from the Commission."

[fol. 26] The writ of mandamus is a common law writ to compel a public officer to perform a ministerial duty. It does not issue to compel a private corporation to pay a tax, but does issue to compel a public officer or municipal corporation to refund a tax. Article 16 is a specific statute providing a complete remedy at law pursuant to which express companies can apply for and get refunds.

Petitioner argues that this remedy is not specifically provided for express companies because Article 16 does not contain the words "express companies." And it points to § 58-540 in Article 2 which mentions railway and canal companies and to § 58-616 in Article 10 which mentions water or heat, light and power companies.

Section 58-540, relating specifically to railways and canals, and § 58-616, relating specifically to water or heat, light and power companies, relate solely to relief in the Circuit Court of the City of Richmond. Neither section provides for relief on application to the State Corporation Commission, and both are unconstitutional. § 58-540 conflicts with Sec. 180 of the Constitution which provides that a railway or canal company "may, according to such course of procedure as may be prescribed by law, apply for relief first to the State Corporation Commission and *then* to the Circuit Court of the City of Richmond." § 58-616 conflicts with Sec. 156(d) of the Constitution which forbids any circuit court to "review, reverse, correct or annul any action of the Commission, within the scope of its authority."

Article 16 covers "any transportation company, transmission company or other public service corporation." Therefore railway and canal companies, and water or heat, light and power companies can seek relief under Article 16. § 58-676 (in Article 16) provides that all of them, *after review by the Commission*, can go to the Circuit Court of the City of Richmond. That provision appears to be unconstitutional as to all except railway and canal companies (Const.

Sec. 180). § 58-677 (in Article 16) provides that all parties may go to the Circuit Court of the City of Richmond "for relief from any original assessment without having first applied to the Commission for a review thereof." That section appears to be inconsistent with Sec. 156(d) of the Constitution.

Accordingly, railway, canal, water, heat, light, power and express companies are all specifically provided for in Article 16. All may petition under Article 16 and all must petition under Article 16. The argument based on the fact that express companies are not mentioned by name in Article 16 applies equally to all the others, because none of them is there specifically mentioned by name. A statute [fol. 27] that applies specifically to all transportation companies applies specifically to every transportation company. In legislating for a class, the legislature does not have to name every member of the class in order to make the law apply specifically to every member of the class. The class to which Article 16 applies consists of public service companies whose real estate and tangible property are assessed by the Commission, whose state franchise or license taxes are assessed by the Commission, and to whom the Clerk of the Commission is required by law to forward a certified copy of the assessment. The three months begins to run "after receiving a certified copy of such assessment of value or tax." The taxpayer has actual notice of the assessment before time begins to run against him.

Such taxes are assessed by the Commission after giving the taxpayers thirty days' notice that the assessment is to be made. See the following sections:

| | |
|---|---|
| Railway and canal | § 58-529 |
| Express companies | § 58-549 |
| Freight car companies | § 58-558 |
| Sleeping cars | § 58-566 |
| Steamship lines | § 58-582 |
| Pipe lines | § 58-590 |
| Water, heat, light & power | § 58-610 |
| City bus lines | § 58-647 |

The notice specifies the date when a hearing will be held on the assessments in the courtroom of the Commission.

Each taxpayer is given an opportunity to be heard. After the hearing the taxes are assessed by order of the Commission and copies of the assessments are printed and sent to the State Comptroller and to every city, town and country, and to each taxpayer. The sections of the Code relating to the certification of these assessments by the Clerk of the Commission are:

| | To Comptroller and taxpayer | To cities, towns and counties |
|---|---|---|
| Railroads | § 58-530 | § 58-538 |
| Express companies | § 58-550 | § 58-551 |
| Freight cars | § 58-559 | None |
| Sleeping cars | § 58-567 | None |
| Steamships | § 58-572 | § 58-573 |
| Tel. & tel. | § 58-583 | § 58-584 |
| Pipe lines | § 58-590 | § 58-592 |
| Water, etc. | § 58-611 | § 58-612 |
| City bus | § 58-648 | § 58-650 |

[fol. 28] Taxpayers falling in this class are thus notified in advance of the assessment that is about to be made, and each taxpayer receives an invitation to state his objections to the assessment before it is made. After the assessments have been made and printed copies are certified to all the interested parties. Article 16 then gives each taxpayer three months in which to file a petition for a review and correction of any item that he takes exception to. Article 16 provides the specific method for review and correction of the taxes thus assessed.

Petitioner bases two arguments on the wording of § 58-1122 on the mistaken assumptions (1) that the Commission assesses license taxes only against public service companies, and (2) that if the *res judicata* clause in § 58-1122 does not apply to proceedings under § 58-672, there is nothing else for it to apply to.

1. The first of these arguments is stated on page 10 of petitioner's brief:

"The General Assembly must have intended for at least some corporations to have a right to claim a refund of license taxes under Section 58-1122; otherwise that part of

the statute would be meaningless and presumably would not have been adopted by the General Assembly. Since the Commission assesses those taxes only against public service corporations it is apparent that the relief granted to such corporations by Section 58-672 cannot be exclusive."

The Commission assesses many taxes beside public service company taxes. Some of these taxes are called license taxes and are license taxes; others are not called license taxes and are license taxes.

For example, the taxes imposed by Articles 12 and 13 are called "road taxes" and are license taxes. If a motor carrier fails to pay these taxes, we revoke his privilege to use the highways.

The taxes imposed on insurance companies by § 58-486 are called license taxes and are license taxes. They are assessed by the Commission under § 58-497. If they are not paid, the Commission revokes the taxpayer's license to do business (§ 58-498).

These are examples of taxpayers who can claim refunds under § 58-1122.

The so-called "license" taxes imposed on express companies are the same kind of taxes as the "franchise" taxes imposed on railroads. Neither of them is a license tax, be- [fol. 29] cause neither is exacted as a condition of carrying on the business. A license tax is an excise tax that must be paid as a condition of carrying on a business or exercising a privilege.

2. The second of these arguments is stated on page 12 of petitioner's brief:

"Section 58-1122 provides that a refund of tax cannot be obtained 'after a formal adjudication in a proceeding in which the right of appeal existed and was not taken.' The quoted language must refer to a proceeding that could be brought under a section other than Section 58-1122 in which the decision was against the taxpayer; * * *."

The quoted language is merely a statement of the doctrine of *res judicata*. Many taxes assessed by the Commission are certified to the Comptroller for collection. If such a tax is not paid, the Comptroller causes suit to be brought against the delinquent taxpayer. If the decision in that

suit is against the taxpayer, he obviously cannot pay the tax and thereafter apply for a refund. The same principle applies to cases in which the Commission imposes penalties on taxpayers under § 58-635 and 58-642. If the penalty is imposed for failure to pay taxes, it would be a bar to an application for a refund of the same taxes. All decisions of the State Corporation Commission can be appealed.

Case No. 10,629 must be dismissed because the petition was not filed in time. We turn now to the constitutional question that is properly raised in Case No. 10,767.

## The Constitutional Question

This case is governed by *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, appeal dismissed, 96 L. Ed. Adv. Ops. 578 (April 21, 1952).

Article 7, taxing steamship companies, and Article 4, taxing express companies, are so much alike that no distinction can be drawn between them. Petitioner, realizing that the decision of that case would control this case, filed a brief *amicus curiae* in that case. In that brief, petitioner said (p. 2):

"In view of the importance of the Court's ruling, both to the Appellees and to many other corporations operating in Virginia either entirely or partly in interstate commerce, Railway Express thought it in the public interest that this Court should have before it a full presentation of its viewpoint on the problems involved."

[fol. 30] The Supreme Court of Appeals, at page 68 of its opinion said:

"In the case of steamship companies (and also express companies) the tax is denominated a license tax, and the requirement is that every such company shall pay it 'for the privilege of doing business in this State, in addition to the annual registration fee and property tax.' But what it is called is not necessarily what it is."

Except for poll taxes, all taxes are either excise taxes or property taxes. The reason it is necessary to decide whether a particular tax is an excise tax or a property tax is because of constitutional limitations. The constitution of the United

States, for example, provides, in effect, that all federal taxes on property must be apportioned among the several states in accordance with their respective populations, and that all federal excise taxes must not be so apportioned, but must be uniformly applied throughout the United States. Accordingly, the constitutionality of every federal tax depends on whether it is an excise tax or a property tax. Beginning with *Hylton* v. *United States*, 1 L. Ed. 556 in 1796, nearly every federal tax has been contested in the Supreme Court on the ground that it was not properly apportioned or was not properly uniform. In the great case of *Pollock* v. *Farmers Loan & Trust Co.*, 158 U. S. 601, 39 L. Ed. 759 (1895) the court held, five to four, that a general income tax was a property tax as to income from property and an excise tax as to income from earnings. That decision was reversed in 1913 by the 16th Amendment, and has never commanded universal respect. The Court of Appeals of Virginia refused to follow it in 1936 in *Hunton* v. *Commonwealth*, 166 Va. 229.

Beginning with decisions rendered by Chief Justice Marshall the Supreme Court has held that the commerce clause, which says that Congress shall have power to regulate interstate commerce, means that the states are forbidden to regulate interstate commerce. Since those decisions are based more on considerations of policy than of logic, they cannot be carried to a strictly logical conclusion; and ever since *Cooley* v. *Board of Wardens*, 12 How. 299, 13 L. Ed. 996 (1851), it has been recognized that the states are free to regulate some parts of interstate commerce, namely those parts that the Supreme Court thinks it desirable that the states should be free to regulate. Proceeding from the field of regulation to the field of taxation, the Supreme Court has decided that a state tax on interstate commerce is a state [fol. 31] regulation of interstate commerce and is void if it goes too far. It is interesting to look at the actual words of the constitution and then contemplate the edifice the court has built on them.

Those words are:

"The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *."

With only those words to guide it the court has struck down countless state taxes on the ground that they impede the free flow of commerce more than they should, and has upheld countless state taxes on the principle that "interstate commerce must pay its way."

In this field of constitutional law the court itself, without any words in the constitution expressing or implying any such distinction, has drawn a line between excise taxes and property taxes. If the tax is an *excise* tax, the court may or may not strike it down, but if the tax is a *property* tax all is well: state taxes on property *used* in interstate commerce are upheld so long as the property is located in the taxing state. State property taxes that get by the due process clause do not run into trouble with the commerce clause.

So, when the Virginia Supreme Court of Appeals held that the license taxes on steamship and express companies were property taxes, all danger of an adverse decision in the Supreme Court of the United States was averted, and that court dismissed the appeal without comment, presumably on the ground that no federal question worth discussing was involved. In *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55, the court said (p. 70):

"Likewise, in the 1941 Annual Report of the Commission, page 41, it was said:

" 'Therefore, in making the assessment of the physical properties, we are assessing the tracks, track structures, cuts, fills, tunnels, bridges, and the like, or, in other words, the bare bones of the property denuded of the intangible elements of value which may be attributable to them. It should also be borne in mind that the franchise value is assessed at 100%.'

"It thus appears that the physical properties of these appellees, according to this practice, were assessed on the basis of their dual values, the dead value, or 'the bare [fol. 32] bones,' to be taxed by the locality, and the live, or going concern value, to be taxed by the State for the protection and services rendered by it. That the going concern value is thus taxable, although the basic items of property on which it arises are used in interstate commerce, is established by numerous decisions of the Supreme Court, as set

out above. This tax on the going concern value is in effect an increase of the *ad valorem* rate, *Memphis Natural Gas Co.* v. *Stone, supra.* In its derivation and substance it is a tax on an element of value of the physical properties not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed. It is, therefore, a tax which is not prohibited by the Commerce Clause."

Commenting on this decision, the April, 1952, Virginia Law Review at page 423 remarks:

"It appears that the Court in the instant case preferred to sustain the tax on the ground that it was an *ad valorem* tax rather than on the ground that it was a privilege tax on a business not exclusively interstate in character. If the mental gymnastics employed by the Court are questioned, it may only be answered that this is not the first time such an approach to the problem has be-n used. If the Spector case is an indication of a return to the 'direct-indirect' test as to state taxation of interstate commerce, then the Court was wise in its choice of grounds."

We deprecate this suggestion that our highest court engaged in "mental gymnastics" to get around the *Spector* case. Long before the *Spector* case was heard of the franchise or license taxes on public service companies were regarded as property taxes.

Sec. 170 of the constitution provides:

"The General Assembly * * * may impose State franchise taxes, and in imposing a franchise tax may, in its discretion, make the same in lieu of taxes upon *other property,* in whole or in part, of a transportation, industrial or commercial corporation."

If the framers of the constitution had not regarded franchise taxes as taxes on *property,* they could not have used the words "*other* property."

(§ 58-553 makes the express company tax in lieu of other taxes. By virtue of that section express companies escape the tax on their rolling stock.)

[fol. 33] The franchise or license taxes imposed on public service companies are taxes on *intangible* property.

In *Commonwealth* v. *Baltimore Steam Packet Co.*, 193 Va. 55 at page 69 the court said:

"We said in that opinion that the existing method of assessing the properties of the utility involved in that case was developed from the system prescribed for the assessment of railroad properties, and we quoted from a letter relating to railroad assessments written by Commissioner Epes, afterwards a justice of this court, saying in part:

' "The value of these physical properties, which the Commission has tried to ascertain as the 100% basis to which to relate its assessments, is the actual value as of January 1, 1927, of the land and other physical properties of the railroad company exclusive of any franchise value, good will, "going concern value," "cost of establishing the business," or other "intangible" value of the company." ' "

An express company with a nation-wide monopoly enjoys valuable good will. The going concern value of its property greatly exceeds the value of its real estate and trucks. And that going concern value is of course intangible property. The nature of that property has been described by the Supreme Court in *Adams Express Company* v. *Ohio*, 166 U. S. 185, 41 L. Ed. 965 (1897) as follows:

"But this contention practically ignores the existence of intangible property, or at least denies its liability for taxation. In the complex civilization of today a large portion of the wealth of a community consists in intangible property, and there is nothing in the nature of things or in the limitations of the Federal Constitution which restrains a state from taxing at its real value such intangible property."

* * * * * * *

"The first question to be considered therefore is whether there is belonging to these express companies intangible property—property differing from the tangible property—a property created by either the combined use or the manner of use of the separate articles of tangible property, or the grant or acquisition of franchises or privileges, or all together. To say that there can be no such intangible prop-

[fol. 34] erty, that it is something of no value, is to insult the common intelligence of every man."

• • • • • • •

"But where is the situs of this intangible property? The Adams Express Company has, according to its showing, in round numbers $4,000,000 of tangible property scattered through different states, and with that tangible property thus scattered transacts its business. By the business which it transacts, by combining into a single use all these separate pieces and articles of tangible property, by the contracts, franchises, and privileges which it has acquired and possesses, it has created a corporate property of the actual value of $16,000,000. Thus, according to its figures, this intangible property, its franchises, privileges, etc., is of the value of $12,000,000 and its tangible property of only $4,000,000. Where is the situs of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter."

At the 1952 session of the General Assembly, Article 7, imposing taxes on steamship carriers, was rewritten; and petitioner argues that the amendment amounts to a legislative declaration that the Supreme Court of Appeals had misinterpreted the intent of the legislature. At page 27 of its brief petitioner says:

"Applicant is of course aware of the decision of the Supreme Court of Appeals in the *Baltimore Steam Packet Company* case, supra, that a quite similar tax on steamship and other water carriers was not a privilege tax but a property tax on the going concern value of such companies. This Honorable Commission would undoubtedly be bound by that decision in applying the statute to any other *steamship* company, except for the action of the General Assembly at its 1952 Session in amending the gross receipts tax on such companies (Sec. 58-575 of the Code of Virginia) so as to provide that such tax should apply *only* to gross receipts

derived from *intrastate* commerce in Virginia. The effect [fol. 35] of this amendment is to nullify at the earliest opportunity the decision of the Court of Appeals in the *Baltimore Steam Packet Company* case and clearly establishes the legislative *intent* that the tax there involved was never intended to apply to gross receipts earned from *interstate* commerce. Applicant therefore respectfully submits that the action of the General Assembly in amending Section 58-575 of the Code of Virginia (subsequent to and in the light of the opinion of the Supreme Court of Appeals in the *Baltimore Steam Packet* case) definitely establishes the *nature* of that tax to be a *privilege* tax, rather than a property tax. *The tax on express companies under consideration here is so similar as to be subject to the same interpretation.*"

This argument about legislative "intent," when broken down into its component parts, asserts three things:

1. The legislature wanted to "nullify" the court's decision. The word "nullify" is used to create the impression that the legislature was trying to wipe the decision off the books retroactively.

2. The tax was "never intended to apply to gross receipts from *interstate* commerce." This is saying that the legislature amended the law for the purpose of changing its meaning retroactively. The argument asserts that although the statute expressly covered interstate commerce, the legislature never intended it to cover interstate commerce.

3. The legislature, having learned that the tax is constitutional because it is a property tax, quickly amended the law for the purpose of expressing its desire that the Court of Appeals hold unconstitutional the tax on express companies.

Of course, in seeking the "intent of the legislature", we are not looking for what was in the back of the minds of the legislators. The intent of the legislature must be found in the words used by the legislature, and the object of interpretation is to discover the ***meaning*** of those words.

The words in question are:

"* * * all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State * * *."

Petitioner asks us to hold that the General Assembly, by amending the statute in 1952, intended to say that its words [fol. 36] "business passing through, into or out of this State" were never intended to describe anything but intrastate movement. Such an interpretation is impossible.

Petitioner asks us to hold that the 1952 amendment was intended to be retroactive and to "nullify" the decision of the Court of Appeals. If the decision were really nullified, it could not be enforced, and the steamship companies would not have to pay the 1950 and 1951 taxes. But the new statute (Chapter 486, Acts of 1952) concludes:

"These sections as amended shall go into effect as of the beginning of the first day of January, nineteen hundred fifty-three."

Not only has the legislature not nullified the 1950 and 1951 assessments: it has declared that the taxes shall be assessed for 1952, and has thereby expressed its agreement with the court that the tax measured by interstate earnings is valid.

This amendment was not adopted for the purpose of expressing disapproval of the court's interpretation of the law but for the purpose of encouraging navigation in the great port of Hampton Roads. That was a subject prominently before the 1952 General Assembly. The legislature toured Hampton Roads in a body and passed a law (Chap. 61, Acts of 1952) to create the "Virginia State Ports Authority" to encourage the development of the ports. As one means of promoting that public policy, the legislature reduced the taxes on steamship lines beginning with the year 1953. Since the Court of Appeals had just held that the license tax imposed by §58-575 was not a privilege tax, the General Assembly, when it amended §58-575, left out the word "privilege" for the purpose of making it clear that it agreed with the holding of the court that these taxes are not in fact privilege taxes. Petitioner's argument that we should now hold that the legislature was trying to make unconstitutional the franchise and license taxes on which so large a part of the state's revenue depends is as topsy-turvy as the upside-down fraction in the apportionment formula.

Unquestionably, the fraction described in § 58-575 for

steamship lines and in §58-547 for express companies is upside down. Many people find it confusing to describe ratios and this mistake is not uncommon. However, it is clear in both sections that the legislature meant to tax only a *part* of the total gross receipts. The legislature could not have intended to tax *more* than the total gross receipts. If one-[fol. 37] tenth of the gross receipts were earned in Virginia, the legislature intended to measure the tax by one-tenth of the gross receipts and not by ten times the gross receipts. The language of the steamship company fraction is more defective than that of the express company fraction. §58-575 uses the words:

"* * * that *proportion* of the total receipts * * *."

§ 58-547 uses the words:

"* * * that *portion* of the total receipts * * *."

Thus, the express company formula contains within itself a word stating the intent of the legislature to tax only a *portion* of the gross receipts.

The actual measure of the tax is stated in § 58-547:

"When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; * * * "

The proviso:

"* * * unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts * * *."

merely points out a method of computing the amount of receipts earned in Virginia. The taxing statute is complete in itself without the proviso, and the proviso itself directs that the formula be not used if it be clearly shown that application of the formula would result in taxing receipts that could not properly be deemed to have been earned within the State.

Heretofore, the Commission has acquiesced in the view that, because the density of express traffic is greater in other parts of the country than in Virginia, it would not be

fair to the company to employ the formula based on mileage. In recent years the Commission and the company have by mutual agreement employed a rough and ready formula that, because of changing conditions, is getting out of line and will have to be revised. The statutory formula (with the fraction turned right side up) produces the maximum tax, the formula under which the tax complained of was [fol. 38] assessed produces the minimum tax, and the correct measure of receipts actually earned within the State lies somewhere between the two. The taxpayer cannot be heard to complain that the tax is too low.

The *Spector* case does not invalidate any property taxes but only some excise taxes. Since the tax complained of is a property tax and not an excise tax, it is unnecessary to decide whether the Delaware corporation is doing an intrastate business in Virginia through the agency or instrumentality of the Virginia corporation.

A corporation is an imaginary person created under and by virtue of a statute that gives it eternal life and its stockholders limited liability. The command of the statute is that this fictitious creature shall be treated as if it were real. When courts, as they frequently do, ignore the corporate entity in order to achieve justice, they necessarily ignore the words of the statute creating the corporation, on the theory that the legislature could not have intended the corporate fiction to be used for a wrongful purpose. The Virginia Court of Appeals, in *Beale* v. *Kappa Alpha*, 192 Va. 382 at 399 summed up the law on the subject by quoting from a Texas case:

"'* * * Just when a corporation will be regarded as the adjunct, creature, instrumentality, device, stooge, or dummy of another corporation is usually held to be a question of fact in each case. As above stated the general rule is that the separate corporate entity of corporations will be observed by the courts, even though one may dominate or control another, or may treat it as a mere department, instrumentality, agency, etc.; and courts will disregard the separate legal identities of the corporation only when one is used to defeat public convenience, justify wrongs, protect fraud or crime of the other.'"

The Delaware corporation created and uses the Virginia

corporation not for the purpose of getting around the law but for the purpose of obeying the law. We therefore hold that the corporate entity cannot properly be ignored and that the Delaware corporation is engaged only in interstate business in the State of Virginia. Since the tax is a property tax it is constitutional even though the taxpayer does no intrastate business.

Hooker, Chairman, and King, Commissioner, concur.

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[fol. 39] Before the State Corporation Commission

[Title omitted]

Order Directing Transmittal of Certain Exhibits—August 4, 1952

Case No. 10629
Case No. 10767

The Railway Express Agency, Incorporated, having filed due notice of appeal in these cases, and counsel for that corporation, the Attorney General of Virginia, by Henry T. Wickham, Assistant Attorney General of Virginia, and counsel for this -ommission having agreed that Exhibits 6, 7 and 8 in Case No. 10767 only accompany the record on appeal;

It is ordered that the exhibits mentioned, numbered and described as follows, be forwarded to the Clerk of Supreme Court of Appeals of Virginia to be returned by him to this commission with the mandate of that court:

| Exhibit No. | Description |
|---|---|
| 6 | Railway Express Agency, Incorporated, Taxes and Assessments, Va., 1931 thru 1951. |
| 7 | Railway Express Agency, Incorporated, of Virginia, Taxes and Assessments, 1933 thru 1951. |
| 8 | Copy of letter, Dec. 10, 1942, and enclosure, from H. S. Marx to J. C. Masten. |

A true copy. Teste: N. W. Atkinson, Clerk of the State Corporation Commission.

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[fols. 40-42] Chairman's Certificate (Omitted in Printing)

[fol. 43] IN THP SUPREME COURT OF APPEALS OF VIRGINIA

Record No. 4036

PETITION FOR AN APPEAL FROM AN ORDER OF THE STATE CORPORATION COMMISSION—FILED AUGUST 12, 1952

To the Honorable Justices of the Supreme Court of Appeals of Virginia:

Railway Express Agency, Incorporated, a Delaware corporation, respectfully represents that it is aggrieved by a final order entered by the State Corporation Commission on June 16, 1952, in Case Number 10,629, denying its petition for correction of assessments and refund of license taxes paid for the year 1950. A copy of said order appears in the copy of the record presented with this petition.

On July 3, 1952, counsel for Appellant filed with the Clerk of the State Corporation Commission a notice of appeal which had been delivered to opposing counsel, counsel for the Commission and the Attorney General of Virginia.

Since the appeal here is of right, no statement of facts or assignments of error are made in the petition. There is *filed with this petition, as a part hereof, a certified* . . . . . *is* filed with this petition, as a part hereof, a certified copy of the pertinent portions of the record of the proceedings before the State Corporation Commission as determined by stipulation of counsel filed herewith. In addition, there fflfol. 44[ are certified three of the original exhibits introduced at the hearing before the State Corporation Commission which are referred to in the stipulation.

WHEREFORE, petitioner respectfully prays that an appeal be awarded it and that this Honorable Court review and reverse the action of the State Corporation Commission, and enter an order correcting the assessment of and refunding the taxes paid by petition- . . . for the year 1950, in accordance with the prayer of the petition filed with the State Corporation Commission on July 16, 1951.

On August 11, 1952, copies of this petition were mailed to J. Lindsay Almond, Jr., Attorney General of the Commonwealth of Virginia, and Norman S. Elliott, counsel for

the State Corporation Commission, on behalf of the Appellee herein.

Respectfully submitted, Railway Express Agency, Incorporated, By (S.) Thomas B. Gay, 1003 Electric Building, Richmond, Virginia, Its Attorney.

J. H. Mooers, W. H. Waldrop, Jr., H. Merrill Pasco, Of Counsel.

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[fol. 45] I, H. Merrill Pasco, the undersigned counsel, duly qualified to practice in the Supreme Court of Appeals of Virginia, do certify that in my opinion the order of the State Corporation Commission in the above case is erroneous and that said order should be reviewed and reversed.

Given under my hand this 11th day of August, 1952.

(S.) H. Merrill Pasco, 1003 Electric Building, Richmond, Virginia.

August 12, 1952

Appeal awarded as of right.

/s/ Willis D. Miller

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[fol. 46] In The

Supreme Court of Appeals of Virginia

Record No. 4037

Petition for an Appeal From an Order of the State Corporation Commission—Filed August 12, 1952

To the Honorable Justices of the Supreme Court of Appeals of Virginia:

Railway Express Agency, Incorporated, a Delaware Corporation, respectfully represents that it is aggrieved by a final order entered by the State Corporation Commission on June 16, 1952, in Case Number 10,767, denying its petition for correction of assessments and refund of license taxes paid for the year 1951. A copy of said order appears in the copy of the record presented with this petition.

On July 3, 1952, counsel for Appellant filed with the Clerk of the State Corporation Commission a notice of appeal which had been delivered to opposing counsel, counsel for the Commission and the Attorney General of Virginia.

Since the appeal here is of right, no statement of facts or assignments of error are made in the petition. There is filed with this petition, as a part hereof, a certified copy of the pertinent portions of the record of the proceedings before the State Corporation Commission as determined by stipulation of counsel filed herewith. In addition, there are certified three of the original exhibits introduced at the [fol. 47] hearing before the State Corporation Commission which are referred to in the stipulation.

WHEREFORE, petitioner respectfully prays that an appeal be awarded it and that this Honorable Court review and reverse the action of the State Corporation Commission, and enter an order correcting the assessment of and refunding the taxes paid by petitioner for the year 1951, in accordance with the prayer of the petition filed with the State Corporation Commission on November 6, 1951.

On August 11, 1952, copies of this petition were mailed to J. Lindsay Almond, Jr., Attorney General of the Commonwealth of Virginia, and Norman S. Elliott, counsel for the State Corporation Commission, on behalf of the Appellee herein.

Respectfully submitted, Railway Express Agency, Incorporated, By (S.) Thomas B. Gay, 1003 Electric Building, Richmond, Virginia, Its Attorney.

J. H. Mooers, W. H. Waldrop, Jr., H. Merrill Pasco, Of Counsel.

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[fol. 48] I, H. Merrill Pasco, the undersigned counsel, duly qualified to practice in the Supreme Court of Appeals of Virginia, do certify that in my opinion the order of the State Corporation Commission in the above case is erroneous and that said order should be reviewed and reversed.

Given under my hand this 11th day of August, 1952.

(S.) H. Merrill Pasco, 1003 Electric Building, Richmond, Virginia.

August 12, 1952

Appeal awarded as of right.

/s/ Willis D. Miller

EXHIBIT No. 6
Case No. 10767
Filed March 19, 1952
Witness—Gross Bailiff—Saunders

Railway Express Agency, Incorporated

Taxes and Assessments
State of Virginia

| Year (a) | Gross Receipts Reported (b) | State License Tax Paid on Gross Receipts (c) | Money On Deposit (d) | Taxes Paid on Money on Deposit (e) | Reported Value of Real and Tangible Personal Property (f) | Assessment on Real and Tangible Personal Property (g) | Taxes Paid on Real and Tangible Personal Property (h) |
|---|---|---|---|---|---|---|---|
| 1931..... | $ 3,811,395.55 | $40,138.18 | $127,900.00 | $255.80 | $142,708.52 | $137,144.00 | $3,497.88 |
| | ⁂(2,432,616.75) | | | | | | |
| 1932..... | *3,811,395.55 | 35,594.19 | 20,460.80 | 40.92 | 136,634.41 | 130,739.00 | 3,244.03 |
| | ⁂(2,157,223.70) | | | | | | |
| 1933..... | 1,034,175.00 | 18,033.21 | 11,141.00 | 22.82 | 82,107.61 | 86,048.00 | 2,128.02 |
| 1934..... | 1,010,013.00 | 16,665.21 | 12,965.00 | 25.93 | 79,984.44 | 84,601.00 | 2,091.08 |
| 1935..... | 1,010,877.00 | 16,679.47 | 12,880.00 | 25.76 | 68,229.89 | 77,946.00 | 1,945.68 |
| 1936..... | 1,091,721.00 | 18,013.40 | 7,805.00 | 15.61 | 56,905.21 | 80,986.00 | 1,971.13 |
| 1937..... | 1,143,198.00 | 18,862.77 | 12,585.00 | 25.17 | 79,472.90 | 63,274.00 | 1,470.52 |
| 1938..... | 1,140,692.00 | 18,821.42 | 12,795.00 | 25.79 | 87,265.03 | 66,581.00 | 1,786.49 |
| 1939..... | 1,270,795.66 | 20,968.13 | 26,795.00 | 53.59 | 107,113.74 | 82,107.00 | 1,914.73 |
| 1940..... | * 860,000.00 | 27,876.88 | 30,869.00 | 61.74 | 113,102.78 | 84,481.00 | 1,944.38 |
| | ⁂(1,689,507.60) | | | | | | |
| 1941..... | * 860,000.00 | 28,672.17 | 40,082.48 | 80.16 | 120,131.98 | 87,461.00 | 2,065.77 |
| | ⁂(1,737,707.40) | | | | | | |
| 1942..... | 900,000.00 | 31,593.06 | 35,944.29 | 71.89 | 132,058.95 | 93,498.00 | 2,831.92 |
| | ⁂(1,914,730.86) | | | | | | |
| 1943..... | 2,538,933.12 | 41,892.40 | 28,438.48 | 56.88 | 169,143.15 | 117,647.00 | 2,873.74 |
| 1944..... | 3,414,865.06 | 56,345.27 | 61,493.37 | 122.99 | 152,012.83 | 111,594.00 | 2,708.37 |
| 1945..... | 3,910,361.97 | 64,520.97 | 62,794.33 | 125.59 | 141,382.33 | 115,224.00 | 2,792.59 |
| 1946..... | 4,265,031.80 | 70,373.02 | 56,878.56 | 113.76 | 130,529.10 | 126,167.00 | 3,103.26 |
| 1947..... | 4,181,863.68 | 69,000.75 | 84,612.25 | 169.22 | 195,460.71 | 130,723.00 | 3,344.49 |
| 1948..... | 4,270,728.28 | 70,467.02 | 79,091.51 | 158.18 | 192,458.88 | 127,516.00 | 3,312.82 |
| 1949..... | 4,106,518.78 | 88,290.15 | 78,615.15 | 157.23 | 180,771.81 | 120,803.00 | 3,150.99 |
| 1950..... | 3,286,775.70 | 70,665.68 | 66,445.71 | 132.89 | 175,810.54 | 119,979.00 | 3,257.69 |
| 1951..... | 3,090,916.55 | 66,454.71 | 109,906.38 | 219.81 | 193,775.70 | 129,279.00 | 3,389.65 |

* Amount reported.
⁂ Amount assessed.



BLEED THROUGH

[fol. 50]

EXHIBIT No. 7
Case No. 10767
Filed March 19, 1952
Witness—Gross Saunders—Bailiff

Railway Express Agency, Incorporated of Virginia

Taxes and Assessments

| Year (a) | Gross Receipts Reported (b) | State License Tax Paid on Gross Receipts (c) | Money On Deposit (d) | Taxes Paid on Money on Deposit (e) | Reported Value of Real and Tangible Personal Property (f) | Assessment on Real and Tangible Personal Property (g) | Taxes Paid on Real and Tangible Personal Property (h) |
|---|---|---|---|---|---|---|---|
| 1933..... | $ 224,944.50 | $ 3,712.41 | $ 5,000.00 | $10.00 | — | — | — |
| 1934..... | 270,400.86 | 4,461.61 | 5,000.00 | 10.00 | — | — | — |
| 1935..... | 333,055.97 | 5,495.42 | 5,000.00 | 10.00 | — | — | — |
| 1936..... | 353,859.69 | 5,838.68 | 5,000.00 | 10.00 | — | — | — |
| 1937..... | 419,128.97 | 6,915.63 | 5,000.00 | 10.00 | — | — | — |
| 1938..... | 420,969.53 | 6,946.00 | 5,000.00 | 10.00 | — | — | — |
| 1939..... | 455,464.82 | 7,515.17 | 5,000.00 | 10.00 | — | — | — |
| 1940..... | 534,390.39 | 8,817.44 | 5,000.00 | 10.00 | — | — | — |
| 1941..... | 571,645.26 | 9,432.15 | 5,000.00 | 10.00 | — | — | — |
| 1942..... | 657,396.71 | 10,847.05 | 5,000.00 | 10.00 | — | — | — |
| 1943..... | 827,080.19 | 13,646.82 | 23,871.75 | 47.56 | — | — | — |
| 1944..... | 945,619.00 | 15,602.71 | 2,986.16 | 5.97 | $20,700.00 | $24,500.00 | $586.90 |
| 1945..... | 1,012,600.63 | 16,707.91 | 1,838.18 | 3.68 | 20,700.00 | 24,500.00 | 586.90 |
| 1946..... | 1,047,838.92 | 17,289.34 | 2,665.90 | 5.33 | 20,700.00 | 24,500.00 | 586.90 |
| 1947..... | 1,163,375.81 | 19,195.70 | 2,671.00 | 5.34 | 20,700.00 | 24,500.00 | 586.90 |
| 1948..... | 1,236,392.60 | 20,400.48 | 2,853.56 | 5.71 | 20,700.00 | 24,500.00 | 630.90 |
| 1949..... | 987,161.57 | 21,223.97 | 3,275.79 | 6.55 | 20,700.00 | 26,500.00 | 583.00 |
| 1950..... | 949,298.77 | 16,109.92 | 3,944.48 | 7.89 | 20,700.00 | 26,500.00 | 583.00 |
| 1951..... | 622,211.90 | 13,377.56 | 2,709.83 | 5.42 | | | |

[fol. 51] Case No. 10767

EXHIBIT No. 8

Filed March 19, 1952

Gross
Witness
Saunders
Bailiff

December 10, 1942

Mr. J. C. Masten
First Assistant Assessor
State Corporation Commission
Richmond, Virginia

Dear Mr. Masten:

Attached is the memorandum dictated in my office today following the conference which we had with you and Mr. Drummond regarding the future taxes of this Company. If it is not entirely satisfactory to you it will be appreciated if you will kindly advise me.

With kindest regards,

Sincerely yours,

Original letter signed H. S. Marx.

bcc to Mr. Thomas B. Gay
bcc to Mr. W. A. Benson
HSM/CT

• • •

[fol. 52] New York, December 10, 1942

Report will be made as heretofore, including protest and showing gross system receipts, including truck and air receipts. The mileage will be shown as heretofore, showing similarly air line mileage and motor truck mileage.

For 1943 the Commission will increase its 1942 assessment of $1,914,730.86 by the percentage in which the system reported gross receipts increase for the year ending December 31, 1942. This will be done regardless of any variations in mileage, and this procedure will be continued each year thereafter, the Commission increasing or decreasing its assessment in accordance with the percentage of increase

or decrease of system gross receipts until the Commission or the Express Company desires a reconsideration of the method, it being understood, however, that if there is a decline in receipts following termination of the present war the Commission will not seek to hold the taxes up to the level of the preceding years.

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[fol. 53] In the Supreme Court of Appeals of Virginia:

(The following is an extract from appellant's opening brief, pages 8 and 9 thereof, filed November 12, 1952.)

ASSIGNMENT OF ERRORS AND STATEMENT OF QUESTIONS INVOLVED

In compliance with Rule 5:11 of this Court, Appellant assigns the following errors in these cases:

1. The Commission erred in holding § 58-672 to be the exclusive remedy of public service corporations seeking correction of tax assessments and refunds of taxes actually paid, and denying the Appellant the right to proceed under § 58-1122 for a refund of the tax paid for 1950.

2. The Commission erred in the case concerning the 1951 tax:

(a) In holding the tax imposed under § 58-547 to be a property tax rather than a license tax;

(b) In sustaining the validity of the apportionment formula of § 58-547; and

(c) In holding the tax imposed under § 58-547 applicable to Appellant even if it be a property tax since Appellant has no going concern or intangible value.

There are therefore presented in these two appeals the following questions:

1. Is § 58-672 the exclusive remedy for public service corporations seeking correction of assessment and refund of taxes actually paid to the Commonwealth?

2. Is the tax imposed under § 58-547 a property tax or a license tax?

3. Is the apportionment formula of § 58-547 valid?

4. Does Appellant have a going concern or intangible

value which can lawfully be made the subject of a property tax in this State?

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[fol. 54] Before the Supreme Court of Appeals of Virginia at Richmond.

Present, All the Justices.

Railway Express Agency, Inc. v. Record Nos. 4036, 4037, Commonwealth of Virginia:

OPINION BY JUSTICE LEMUEL F. SMITH—MARCH 9, 1953
FROM THE STATE CORPORATION COMMISSION

The appellant, Railway Express Agency, Incorporated, filed two applications with the State Corporation Commission seeking the correction of assessments of State taxes made against it by the Commission and the refund of taxes paid for 1950 of $70,665.68 and for 1951 of $66,454.71, which taxes were measured by gross receipts from business done in Virginia under the provisions of Code, § 58-547[1]. The

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[1] "§ 58-547. Annual license tax.—Every such company, [express company] for the privilege of doing business in this State, in addition to the annual registration fee and the property tax as herein provided, shall pay an annual license tax as follows:

"The tax shall be equal to two and three-twentieths per centum upon the gross receipts from operations of such companies and each of them within this State. When such companies are operating partly within and partly without this State, the gross receipts within this State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or out of this State; provided, unless otherwise clearly shown, such last-mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this State.

"The provisions of this section shall apply to the assessment for the tax year nineteen hundred forty-nine and annually thereafter, unless otherwise provided by law. (1919, p. 69; 1826, p. 955; 1928, p. 150; Tax Code, § 219; 1948, p.924.)"

applications were made on the ground that the assessments were invalid, because they constituted a burden on interstate commerce in violation of the Commerce Clause of the [fol. 55] Federal Constitution, art. 1, § 8, cl. 3.

The appellant contends that § 58-547 imposes a license tax upon the privilege of carrying on a business exclusively interstate in character and, therefore, is violative of the Federal Constitution; that the apportionment formula provided in § 58-547 is invalid; and that, if the tax assessed under § 58-547 is a property tax, the appellant has no going concern value on which such a tax could lawfully be levied.

Railway Express Agency, Incorporated, a Delaware corporation, is engaged in the handling and transportation of goods, wares and merchandise in express service in both interstate and intrastate commerce in the District of Columbia and in all the States of the Union except Virginia, where it does solely an interstate business. Its intrastate express business in this State is carried on by a wholly-owned subsidiary, Railway Express Agency, Incorporated, of Virginia, a Virginia corporation, organized on October 20, 1931, following the affirmance by this court[2] of an order of the State Corporation Commission which denied the appellant the authority to do an intrastate express business in this State.

[fol. 56] The application for correction of assessment and refund of taxes paid for the year 1950 was dismissed by the Commission, because it was not filed within the time prescribed by Code, § 58-672, the Commission therefore being without jurisdiction to grant the relief requested. The appellant contended before the Commission, as it does here, that Code, § 58-1122 provides an alternative procedure under the terms of which its application was filed within the time provided.

It is not, however, necessary for us to decide whether the petition was timely filed; for even if we assume that the appellant has proceeded correctly under a proper statute, it is not entitled to the relief sought for the reasons hereinafter stated.

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[2] *Ry. Ex. Agy.* v. *Commonwealth*, 153 Va. 498, 150 S. E. 419, *aff'd*, 282 U. S. 440, 51 S. Ct. 201, 75 L. Ed. 450.

The Commission also denied the relief sought in the case of the 1951 assessment, holding that its decision was governed by *Commonwealth* v. *Balto. Steam Packet Co.,* 193 Va. 55, 68 S. E. (2d) 137, *app'l dismissed,* 343 U. S. 923, 72 S. Ct. 763, 72 S. Ct. 764, 96 L. Ed. 1335.

The *Balto. Steam Packet* case arose out of appeals by the Commonwealth of Virginia from two adverse decisions of the State Corporation Commission which held invalid the State taxes assessed under the provisions of Code, § 58-575 against two steamship companies, which taxes were meas- [fol. 57] ured by gross receipts from interstate business done in Virginia. The steamship companies were engaged in both interstate and intrastate commerce, although their intrastate commerce produced only a small fraction of their total revenue. The principal issue in the case centered on the taxpayers' contention that the taxes assessed on receipts from interstate commerce apportioned to business done in this State was a violation of the Commerce Clause. The steamship companies argued that the tax was an annual license tax levied on their gross receipts for the privilege of doing an interstate business in this State and they pointed to the language of § 58-575 which did, at that time, denominate the tax an annual license "for the privilege of doing business in this State."

After discussing the pertinent decisions of the Supreme Court of the United States dealing with the very controversial subject of State taxation as a burden on interstate commerce, we decided in the *Balto. Steam Packet* case that if a tax "is in substance and effect a fairly apportioned tax on property, it is valid." In answer to the question then presented—What kind of tax is levied by § 58-575—we pointed out in the course of our opinion that it is the [fol. 58] operation of the statute and not its descriptive label that governs the character of a tax and concluded that § 58-575 provides for a property tax, not a license tax for the privilege of doing business, in these words: "In its derivation and substance it is a tax on an element of value of the physical properties not reached by the tax levied by the localities, but reserved to the State and not otherwise taxed." 193 Va. at p. 70. This holding was based on analysis of the numerous decisions of the Supreme Court

of the United States discussed in the opinion which recognize the principle that the going concern value of a business is taxable although the individual physical properties from which it arises are used in interstate commerce.

The appellant filed a brief as *amicus curiae* in the *Balto. Steam Packet* case wherein it vigorously upheld the contention of the taxpayers that the tax levied under § 58-575 was invalid. At the oral argument of the case at bar it conceded that this case is on all fours with the case involving the water carriers except that the appellant here does no intrastate business.

In *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, 71 S. [fol. 59] Ct. 508, 95 L. Ed. 573, the rule is laid down that a State tax upon the privilege of carrying on a business exclusively interstate in character violates the Commerce Clause no matter how fairly it is apportioned to business done within the State.

However, the tax levied under the provisions of Code, § 58-547 is not a tax upon the privilege of carrying on a business exclusively interstate in character. Like the tax imposed by Code, § 58-575, which we considered in the *Balto. Steam Packet* case, it is an intangible property tax based on the augmentation in value of the physical assets of the taxpayer arising out of the use of these physical assets as a unit of commerce; this added value being measured by the volume of business done in this State. The physical assets of a taxpayer are said to have a dual value when used in an established going concern; a dead value, or the value of the bare tangible properties themselves; and a live value, or the intangible value which is created by the concerted utilization of the congeries of unrelated items. See *Galveston, etc., R. Co.* v. *Texas*, 210 U. S. 217, 28 S. Ct. 638, 52 L. Ed. 1031; *Richmond* v. *Commonwealth*, 188 Va. 600, 50 S. E. (2d) 654.

[fol. 60] The appellant argues that the action of the General Assembly in amending § 58-575 (applicable to steamship and other water carriers) the month following the decision of this court in the *Balto. Steam Packet* case definitely established the legislative intent to impose that tax as a privilege rather than as a property tax. See Acts of 1952, ch. 486, p. 780. The amendment of § 58-575 deleted

the words "for the privilege of doing business in this State," and then went on to make the tax applicable only to gross receipts derived from intrastate business. We do not see any indication in this amendment of a legislative intent to change the nature of the tax as defined by this court immediately prior to the amendment. For reasons sufficient unto itself, perhaps to encourage the development of the harbors and waterways of Virginia or because for many years the tax on interstate receipts had not been enforced, the legislature changed the law as it applied to steamship and other water carriers, but made no changes in the almost identical statute which applies to express companies. And this was done notwithstanding the fact that the legislature had before it the decision in the *Balto. Steam Packet* case [fol. 61] which stated in the following language that the rule of the case as regards steamship and other water carriers would also apply to express companies:

"In the case of steamship companies (and also express companies) the tax is denominated a license tax, and the requirement is that every such company shall pay it 'for the privilege of doing business in this State, in addition to the annual registration fee and property tax.' But what it is called is not necessarily what it is." 193 Va. at p. 68.

Furthermore, says the appellant, if the gross receipts taxes imposed by § 58-547 (express companies) and § 58-575 (steamship and other water carriers) are in fact property taxes, then § 58-575, as amended in 1952, fails to tax the going concern value which is produced by the interstate business of steamship and other water carriers and consequently is in conflict with § 168 of the Constitution of Virginia which provides that "All property, except as hereinafter provided, shall be taxed"; there being no subsequent provision of the Constitution exempting the property of steamship and other water carriers. If, on the other hand, continues the appellant, these taxes are privilege [fol. 62] taxes, the 1952 amendment of § 58-575 results in no unlawful attempt to exempt property from taxation.

Of course, we do not have before us the question whether § 58-575 violates § 168 of the Constitution, but merely the argument that if § 58-547, and § 58-575 as amended, impose property taxes, the latter is in conflict with § 168 of the

Constitution. When we are confronted with the question of the constitutionality of the 1952 amendment of § 58-575 we will deal with it.

Continuing its argument as to the nature of the tax imposed by § 58-547, the appellant contends that if the taxes levied by the State on the gross receipts of public service corporations are property taxes on the going concern value of such taxpayers rather than privilege taxes, then such taxes are violative of § 171 of the Constitution of Virginia to the extent that they are levied on the going concern value produced by or derived from the physical properties of such corporations, since property of this class and kind is specifically segregated to the localities for taxing purposes. However, as heretofore stated, the *Balto. Steam Packet* case held specifically that the tax involved was a State tax on [fol. 63] *intangible* property which is measured by the gross receipts derived from the use of the physical properties which are taxed by the localities. Intangible property is not segregated to the localities, but is a proper subject of State taxation.

The appellant also asserts the invalidity of the tax on the ground that the apportionment formula provided in § 58-547 is an improper fraction, its numerator being larger than its denominator, with the result that if the formula were applied as written, the State would subject to the tax more than 100% of the total gross receipts of the appellant, regardless of where earned. And it was mandatory, continues the appellant, to use the formula in computing the tax, because nowhere in the record are the gross receipts from business done in Virginia clearly shown.

The identical type of fraction was contained in § 58-575, prior to the 1952 amendment, and the same argument was used in the *Balto. Steam Packet* case. Neither in that case nor the one now before us was the formula used in computing the tax complained of. The 1950 tax herein involved was paid under a form of protest which included this sentence: "The $3,286,775.70 reported as 'All receipts earned in Virginia on business passing through, into or out of this [fol. 64] State,' is computed in accordance with an understanding had with the State Corporation Commission of Virginia, and is made without prejudice to the protest of

this Company against any tax being levied upon, or measured by such receipts." A similar provision was included in the protest filed with the payment of the 1951 tax. The opinion of the Commission states that it has acquiesced in the view that because the density of express traffic is greater in other parts of the country than in Virginia, it would not be fair to the taxpayer to employ the formula based on mileage. The opinion further states that "The statutory formula (with the fraction turned right side up) produces the maximum tax, the formula under which the tax complained of was assessed produces the minimum tax, and the correct measure of receipts actually earned within the State lies somewhere between the two. The taxpayer cannot be heard to complain that the tax is too low." The appellant states in the aforesaid form of protest that it has no way of ascertaining how much of its receipts is applicable to business passing through, into or out of this State. Section 58-547 provides that if the actual receipts from business done in Virginia are not clearly shown, the amount appli- [fol. 65] cable to the tax shall be computed according to the formula. The formula was not used in this case because, in the opinion of the Commission, it would have been inequitable to apply it. Instead a method was used which the appellant prefers to call an "understanding" between it and the Commission which resulted in a tax admittedly lower than it would have been had the formula been used. In fact, the Commission asserts that the tax assessed is less than it would have been even if the appellant had been able to compute its gross receipts resulting from business done in this State. It is not necessary in this case to resort to the formula to compute the tax. Mr. Justice Buchanan in the *Balto. Steam Packet* case called attention to the improper fraction, its numerator being greater than its denominator and said, "That, of course, was not intended." Section 58-575 there referred to has since been amended as pointed out before. The attention of the General Assembly is again called to this matter.

As its final argument the appellant contends that if the tax is a property tax rather than a license tax appellant's property has no going concern value in the generally accepted sense of that term, hence there is no intangible value

on which the tax herein complained of can lawfully be [fol. 66] levied. In short, if this is a property tax, appellant has no property of the type subject to it.

All of the appellant's capital stock is owned by sixty-eight railroad companies and it follows that the policies of the appellant, including the fixing of rates, are determined by the stockholding railroad companies, subject of course to governmental regulation.

The appellant's going concern value, or lack of it, was not an issue before the State Corporation Commission. The question was not raised in the appellant's applications, nor was it mentioned at the hearing before the Commission or in the appellant's memorandum submitted for the Commission's consideration. Naturally, it was not discussed in the Commission's opinion and the question has at no time been considered by the Commission. However, Commissioner Catterall said in the opinion of the Commission while discussing intangible property values: "An express company with a nation-wide monopoly enjoys valuable good will. The going concern value of its property greatly exceeds the value of its real estate and trucks. And that going concern value is of course intangible property. The nature [fol. 67] of that property has been described by the Supreme Court in *Adams Express Company* v. *Ohio*, 166 U. S. 185, 41 L. Ed. 965 (1897) * * *." Thus, that judicial tribunal on the facts before it held that the express company had a going concern value.

Finally, as we have said before, the steamship companies in the *Balto. Steam Packet* case contended that Code, § 58-575 was invalid because it violated the Commerce Clause. No question was raised in that case about the tax on business beginning and ending in this State. The companies paid the tax on their intrastate business without question. The challenge was directed to the tax on all receipts earned in this State on business passing through, into or out of this State. Thus, the only gross receipts considered were those derived from interstate commerce. In the instant case the only business taxed under § 58-547 was interstate business, for the appellant did no intrastate business. The issue, therefore, presented in the case of the steamships and

the case at bar, is the same and arose under statutes almost identical in language and operation.

[fol. 68] Under the decision of the *Balto. Steam Packet* case, it is clear that the provisions of § 58-547 impose a valid property tax on the appellant measured by the gross receipts earned on business done in Virginia.

It follows from what has been said that the orders of the Commission appealed from are affirmed.

Affirmed.

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[fol. 69] In the Supreme Court of Appeals of Virginia, Court-Library Building.

Record No. 4036

RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant

against

COMMONWEALTH OF VIRGINIA, Appellee

Upon an appeal as of right to an order entered by the State Corporation Commission on the 16th day of June, 1952.

MANDATE—MARCH 9, 1953

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order complained of. It is therefore adjudged and ordered that the same be and is hereby affirmed and that the appellant pay to the appellee thirty dollars damages and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said Corporation Commission.

—— ——, Clerk.

[fols. 70-71] In the Supreme Court of Appeals of Virginia, Court-Library Building.

Record No. 4037

RAILWAY EXPRESS AGENCY, INCORPORATED, Appellant

against

COMMONWEALTH OF VIRGINIA, Appellee

Upon an appeal as of right to an order entered by the State Corporation Commission on the 16th day of June, 1952.

MANDATE—MARCH 9, 1953

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order complained of. It is therefore adjudged and ordered that the same be and is hereby affirmed and that the appellant pay to the appellee thirty dollars damages and also her costs by her expended about her defense herein.

Which is ordered to be certified to the said Corporation Commission.

—— ——, Clerk.

[fol. 72] IN THE SUPREME COURT OF APPEALS OF VIRGINIA

Record Nos. 4036, 4037

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES, ASSIGNMENTS OF ERROR AND PRAYER FOR REVERSAL.—May 21, 1953.

To the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States:

I.

Petition for Appeal

Railway Express Agency, Incorporated, a Delaware corporation, the Appellant herein, considers itself aggrieved by the final judgment of the Supreme Court of Appeals of Virginia, dated and entered on the 9th day of March, 1953, in the above entitled cause, affirming the final orders of the State Corporation Commission of Virginia, rendered June 16, 1952, denying the applications of Appellant for refunds of license taxes assessed under Section 58-547 of the Code of Virginia, 1950, for the years 1950 and 1951 and [fol. 73] paid by Appellant under protest in the amounts of $70,665.68 and $66,454.71, respectively, presents this petition within ninety (90) days after March 1, 1953, as required by Section 2101(c) of the Judicial Code and Judiciary (28 U. S. C. 2101(c)), and respectfully shows:

(1) That this final judgment was rendered by the highest court of Virginia in which a decision could be had, in which there was drawn in question the validity of a statute of Virginia on the grounds of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity;

(2) That the statute, the validity of which was so drawn in question, was an Act of the General Assembly of Virginia, approved April 2, 1948 (Acts of the General Assembly of Virginia, 1948, Chapter 466, page 923; Section 58-547 of the Code of Virginia, 1950), which is an amend-

ment and reenactment of the annual license tax imposed upon express companies by Virginia for many years;

(3) That the statute imposes "an annual license tax" on express companies "for the privilege of doing business in this state" of an amount equal to two and three-twentieths per centum upon the gross receipts from operations of such companies within Virginia. The statute provides that when such an express company is operating partially within and partially without Virginia, the gross receipts within the State shall be deemed to be all receipts on business beginning and ending within this State and all receipts earned in this State on business passing through, into or [fol. 74] out of the State; provided, unless otherwise clearly shown, "such last mentioned receipts shall be deemed to be that portion of the total receipts from such business which the entire mileage over which such business is done bears to the mileage operated within this state";

(4) That Appellant is engaged in the express business both interstate and intrastate in every state of the Union except Virginia, *where it is engaged solely in interstate commerce;*

(5) That the ground of the asserted invalidity of the statute is that, as applied to the Appellant in this case, it is repugnant to the commerce clause of the Constitution of the United States.

(6) That therefore the Appellant respectfully shows the Court that this case is one in which, under Section 1257(2) of the Judicial Code and Judiciary (28 U.S.C. 1257(2)), review may be had in the Supreme Court of the United States by appeal.

(7) That a petition for allowance of this appeal was presented to the Honorable Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia and by him disallowed by orders dated May 21, 1953, attached hereto as Exhibit A.

Wherefore, Appellant prays that an appeal be allowed to the Supreme Court of the United States from said final judgment upon Appellant giving bond with the requisite [fol. 75] surety therefor in an amount to be fixed by this Court and that citation be issued in accordance with law.

## II.

### Assignments of Error

The Appellant assigns the following errors in the record and proceedings in said case growing out of the action of the Supreme Court of Appeals of Virginia:

(1) In giving judgment affirming the final orders of the State Corporation Commission rendered June 16, 1952, thereby sustaining the validity of Section 58-547 of the Code of Virginia, 1950, in so far as it purports to authorize the assessment of a tax upon the gross receipts of Appellant derived solely from interstate commerce; and

(2) In failing to hold that Section 58-547 of the Code of Virginia, 1950, was a privilege or excise tax which, in so far as it purports to authorize the assessment of the tax therein provided against Appellant, constitutes a violation of the commerce clause of the Constitution of the United States.

## III.

### Prayer for Reversal

For which error Appellant prays that the judgment of the Supreme Court of Appeals of Virginia, dated and entered the 9th day of March, 1953, in the above entitled [fol. 76] cause, be reviewed and reversed and that judgment be rendered in favor of Appellant and for costs.

This the 21st day of May, 1953.

Railway Express Agency, Incorporated, *Appellant*,
J. H. Mooers, 230 Park Avenue, New York, N. Y.;
Thomas B. Gay, 1003 Electric Bldg., Richmond, Va.;
William H. Waldrop, Jr., 230 Park Avenue, New York, N. Y.

H. Merrill Pasco, 1003 Electric Bldg. Richmond, Va., of Counsel.

[fol. 77] EXHIBIT A TO PETITION

Virginia: In the Clerk's Office, Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 21st day of May, 1953.

Virginia: Before Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia on the 20th day of May, 1953, in vacation of said court.

Record No. 4037

RAILWAY EXPRESS AGENCY, INC., Appellant,

against

COMMONWEALTH OF VIRGINIA, Appellee.

ON PETITION FOR AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES

On consideration of the petition for an appeal herein to the Supreme Court of the United States, it is ordered that the said petition be, and the same is hereby, denied.

/s/ Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia.

A Copy, Teste: H. G. Turun, Clerk.

[fol. 78] Virginia: In the Clerk's Office, Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 21st day of May, 1953.

Virginia: Before Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia on the 20th day of May, 1953, in vacation of said court.

Record 4036

Railway Express Agency, Inc., Appellant,

against

Commonwealth of Virginia, Appellee.

On Petition For An Appeal To The Supreme Court Of The United States

On consideration of the petition for an appeal herein to the Supreme Court of the United States, it is ordered that the said petition be, and the same is hereby, denied.

/s/ Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia.

A Copy, Teste: H. G. Turun, Clerk.

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[fols. 79-140] In Supreme Court of the United States

[Title omitted]

Order Allowing Appeal To The Supreme Court Of The United States—May 28, 1953

The Appellant in this cause, having made and filed its petition praying for an appeal to the Supreme Court of the United States from the judgment made and entered in this cause by the Supreme Court of Appeals of the State of Virginia on the 9th day of March, 1953, with respect to petitions for refund of certain state taxes for 1950 and 1951, having presented its assignments of error and prayer for reversal and its statement as to the jurisdiction of the Supreme Court of the United States on appeal, pursuant

to the statutes and rules of the Supreme Court of the United States in such cases made and provided;

Now, therefore, it is hereby ordered that said appeal be and the same hereby is allowed as prayed for.

[fol. 141] It is further ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of $250.00 with good and sufficient surety, and shall be conditioned as required by law.

It is further ordered that citation shall issue in accordance with law.

Fred M. Vinson, Chief Justice.

May 28, 1953.

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[fols. 142-147] Citation in usual form showing service on Frederick T. Gray omitted in printing.

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[fols. 148-165] Statement directing attention to the provisions of paragraph 3, rule 12, of the rules of the Supreme Court (omitted in printing).

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[fols. 166-167] *Praecipe* for Transcript of Record (omitted in printing).

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[fol. 168] Triplicate certificate (omitted in printing).

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[fols. 169-171] Supreme Court of th United States, October Term, 1953

No. 163

[Title omitted]

Statement of Points To Be Relied Upon and Designation of Parts of Record to be Printed—Filed July 8, 1953

1. Appellant adopts for its Statement of Points upon which it intends to rely on its appeal to this Court the

points contained in its Assignment of Errors heretofore filed.

2. Appellant designates the entire record herein for printing by the Clerk of this Court.

Thomas B. Gray, H. Merrill Pasco, Attorneys for Appellant.

Service of the above statement of points to be relied upon and designation of parts of record to be printed accepted and acknowledged this 7th day of July, 1953.

Frederik T. Gray, Assistant Attorney General.

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[fol. 172] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 163

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—October 12, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

The Chief Justice took no part in the consideration or decision of this question.